IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No.

MICHAEL E. ANDERSON; GERALD BENJAMIN; BETTY BENJAMIN; SHERRIE L. BERTRAND; DAN BUTKAY; LEAH BUTKAY; MATTHEW BURDSALL; MIRANDA BURDSALL; ERICH DEHAVEN; TONYA DEHAVEN; JOHN F. DIETZ; MARGARET A. DIETZ; FRANKLIN GESSAMAN; KATHY E. GESSAMAN; GARY HUFFORD; YVONNE HUFFORD; DIANE M. HUMPHREY; ANDY J. JOHNSTON; JERI L. JOHNSTON; JERILEE KANTHACK; HAROLD E. KELSH; DIANA KUHL-HOWARD; DORIS KUHL; AMY LAMBERT; ERIN LANIGAN; MAT LANIGAN; KYLE A. LAWSON; LINDA L. LAWSON; TERRY LEE LAZURE; JACQUELINE F. LEE; PAMELA A. LEE; CAROL L. MANDERA; JASON MOHLER; JACKIE MOHLER; CHERI L. NEVILLE; MARIE RINGLE; JOHN SIEWERT; ROSE SIEWERT; CONNIE SMIGAJ; ALLAN SMIGAJ; VICKI M. WILHAM; EDWARD C. WILLETT; JARED W. YATES; and ESTHER L. YATES,

Plaintiffs / Petitioners,

vs.

THE MONTANA FIRST JUDICIAL DISTRICT COURT, AND THE HONORABLE DOROTHY McCARTER, PRESIDING JUDGE,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Original Proceeding arising from the First Judicial District Court,
Lewis and Clark County, Anderson, et al. v. BNSF, et al.,
Cause No. ADV-2008-101, Honorable Dorothy McCarter, Presiding Judge

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Pursuant to Rule 14, M.R.App.P., Plaintiffs petition the Court for a writ of supervisory control to reverse two Orders entered by Montana's First Judicial District Court. See Orders attached as Exhibits A-B.

STATEMENT OF FACTS

Plaintiffs own residential properties in Helena, Montana, adjacent to a railyard owned by Defendant BNSF Railway Company ("BNSF"). During the course of operating the Helena railyard, BNSF spilled thousands of gallons of diesel fuel, lead, and other toxic contaminants into the railyard's soil and groundwater. Over time, diesel fuel and carcinogenic constituents migrated from the railyard into the soils and groundwater on Plaintiffs' properties.

Plaintiffs filed suit against BNSF seeking, *inter alia*, restoration damages to clean up the toxic contamination it caused. See Second Amended Complaint and Jury Demand attached as Exhibit C. BNSF "admits that diesel fuel entered the soil and groundwater in the railyard and migrated to some extent outside the railyard; lead has also been detected in soil on the railyard and it is possible that soil particles containing lead migrated from the railyard to adjoining neighborhoods; other substances have been detected in the surface soil of the railyard." See BNSF's Answer to Second Amended Complaint attached as Exhibit D, ¶ VII.

Although Plaintiffs' claims are based on Montana common law, BNSF intends to defend Plaintiffs' claims by alleging compliance with the Comprehensive Environmental Cleanup and Responsibility Act, § 75-10-701, MCA, *et seq.* (CECRA). Plaintiffs therefore moved the court to exclude CECRA evidence from the trial of their compensatory damage claims, and to bifurcate the trial of their punitive damage claims as to which evidence regarding CECRA may be proper. The trial court denied Plaintiffs' motions, holding evidence of CECRA regulatory activity admissible. Exhibit A.

Additionally, BNSF moved the court to enter summary judgment dismissing the claims of 10 Plaintiffs on statute of limitations grounds. The court granted BNSF's motion. Exhibit B.

ISSUES PRESENTED

1. Did the District Court err in denying Plaintiffs' motion in limine and motion to bifurcate which sought to exclude evidence of inapplicable regulatory standards from the trial of Plaintiffs' common law claims?

2. Did the District Court err in entering summary judgment against Plaintiffs on the applicable statutes of limitation?

SUMMARY OF ARGUMENT

On facts identical to the facts of this case, this Court has held evidence of the Montana Department of Environmental Quality's (DEQ) regulatory activity inadmissible with respect to common law compensatory damage claims based on environmental harm to property. *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 80, 338 Mont. 259, 165 P.3d 1079. The trial court's ruling, admitting evidence of regulatory activity for all purposes, is directly contrary to Montana law. Because this Court has held evidence of regulatory compliance admissible for purposes of punitive damages, the only procedure which will ensure a fair trial to all parties is bifurcation. As suggested by Chief Justice McGrath's concurrence in *Malcolm v. Evenflo Co., Inc.*, 2009 MT 285, ¶ 107, 352 Mont. 325, 217 P.3d 514, Plaintiffs' punitive damage claims should be bifurcated for trial before the same jury, following the trial of Plaintiffs' compensatory damage claims. The jury can then decide Plaintiffs' compensatory damage claims without reference to inapplicable regulatory matters, and can properly consider the regulatory activity when subsequently assessing Plaintiffs' punitive damage claims.

Under Montana law, nuisances and trespasses which are capable of abatement are temporary. If the nuisance and/or trespass is temporary, the statute of limitations is tolled until the injury-causing mechanism is abated. The toxic contamination

migrating from the railyard to Plaintiffs' residential properties can be removed. The nuisance and trespass is, therefore, temporary, tolling the applicable statutes of limitation. Furthermore, genuine issues of material fact exist regarding Plaintiffs' knowledge, rendering summary judgment on the statute of limitations inappropriate in any event.

ARGUMENT

"Supervisory control is proper to control the course of litigation when the lower court has made a mistake of law or willfully disregarded the law so that a gross injustice is done and there is no adequate remedy by appeal; also to prevent extended and needless litigation." *State ex rel. U.S. Fid. and Guar. Co. v. Montana Second Judicial Dist. Court*, 240 Mont. 5, 8, 783 P.2d 911, 913 (1989).

In *Payne v. Eighth Judicial Dist. Court*, 2002 MT 313, 313 Mont. 118, 60 P.3d 469, the plaintiff petitioned this Court to exercise supervisory control over a legal conclusion regarding economic consumption evidence in a survival and wrongful death action. The plaintiff argued denial of supervisory control would force the parties into a needless cycle of trial, appeal, and retrial.

The Court held the trial court deviated from well established jurisprudence. To allow the trial court to proceed through trial, appeal, and retrial would further compound the inequities:

> Inevitably, this mistake of law would alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict resulting in additional time and expense for appellate resolution and subsequent litigation. Therefore, any remedy available to Payne on direct appeal would prove inadequate resulting in a gross injustice.

Payne, ¶ 5. The supervisory control considerations at issue in *Payne* are equally present in this case.

Here, the trial court deviated from well-established jurisprudence, finding evidence of DEQ regulatory activity admissible in direct contradiction of *Sunburst.* The court likewise deviated from established Montana law in dismissing the claims of 10 out of 44 Plaintiffs on statute of limitations grounds. All Plaintiffs in this case seek restoration damages for the same plume of toxic contamination. This Court recognized claims for restoration of a single contaminant plume as indivisible in *Sunburst*, ¶¶ 43-44.

Plaintiffs identified over 150 lay witnesses, 2 expert witnesses, and over 130 exhibits. BNSF identified over 80 lay witnesses, 13 expert witnesses, and approximately 400 exhibits. The parties estimate the trial will last three to four weeks. If Plaintiffs must wait to appeal the trial court's evidentiary and summary judgment rulings until the conclusion of the case, and this Court reverses one or both rulings, the parties will be required to duplicate the same evidence during another

three to four week trial. The expert fees for trial preparation and testimony will double. Given the magnitude of this case, the number of witnesses, the nature of the scientific evidence, and the indivisible nature of the restoration damages claim for the same plume of toxic contamination, supervisory control is necessary. *Malta Public School Dist. v. Montana Seventeenth Judicial Dist. Court,* 283 Mont. 46, 49-53, 938 P.2d 1335, 1337-39 (1997) (exercising supervisory control over bifurcation issue to prevent injustice of multiple trials).

I. Did the District Court Err in Holding Evidence of Inapplicable Regulatory Matters Admissible in this Common Law Action?

Plaintiffs filed this action against BNSF asserting only common law claims. Plaintiffs' claims are not based on CECRA, or any other environmental statute. Under circumstances identical to this case, this Court held evidence of a polluter's alleged cooperation and compliance with DEQ regulations irrelevant to private property owners' claims for compensatory damages. *Sunburst,* ¶ 80.

In *Sunburst,* approximately 90 property owners sued Texaco for pollution on their property from a former oil refinery. Like the Plaintiffs' in this case, the *Sunburst* plaintiffs asserted claims under the common law and did not assert claims based on any statute or regulation enforced by DEQ. *Sunburst,* ¶ 19. In defense of the action, Texaco sought to introduce evidence concerning its interaction with DEQ

and alleged compliance with DEQ requirements. *Sunburst,* ¶ 76. The trial court held the evidence irrelevant and prejudicial, and following a verdict in favor of the plaintiffs, Texaco appealed the evidentiary ruling. *Sunburst,* ¶ 75.

This Court observed, "[t]he common law seeks to restore a party to the condition that existed before the injury." *Sunburst,* ¶ 77. The court also recognized restoration damages under the common law are not restricted by regulatory standards:

> Thus, we agree with Sunburst that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law. Nothing in CECRA preempts a common law claim that seeks to recover restoration damages to remediate contamination beyond the statute's health-based standards.

Sunburst, ¶ 59 (emphasis added).

Affirming the jury's restoration damage award, this Court found that since restoration damages would restore a property owner back to the position he or she occupied before the tort, "[a]n award of restoration damages serves to ensure a clean and healthful environment," as guaranteed by the Montana Constitution. *Sunburst,* ¶ 64. Considering the purpose served by an award of restoration damages, this Court found no relevance to DEQ's regulatory activity, with respect to the plaintiffs' compensatory damage claims:

> Evidence of Texaco's after-the-fact negotiations with DEQ in the 1990s and the early 2000s to demonstrate its level of cooperation with

> state regulators after having caused the contamination would not change the scope of the damage or the cost of removing the contamination from the Sunburst property.
>
> * * * * *
>
> We agree with the District Court that DEQ's role in Texaco's belated attempts to comply with CECRA would not be relevant to Sunburst's claims to be made whole under the common law.

Sunburst, ¶¶ 78, 80. See also *Malcolm,* ¶ 44 (reaffirming *Sunburst* and preventing defendants from offering evidence of inapplicable regulatory standards in defense of common law compensatory damage claims).

Despite Montana law establishing the distinction between common law property damage claims and CECRA enforcement, BNSF intends to defend this case by alleging compliance with CECRA. For example, one of BNSF's expert witnesses intends to testify, "[w]ith the exception of a few isolated occurrences, the remaining levels of lead and diesel in the offsite areas meet accepted cleanup and risk-based levels established by [DEQ]. . ." BNSF's Expert Witness Disclosures, Ex. A, p. 1, attached as Exhibit E. While Plaintiffs seek common law restoration damages, the same expert attempts to change the applicable law contending, "[b]ased on the requirements of environmental laws and regulations and the results of the various risk assessments, only a small amount of additional remedial action needs to be performed

in the offsite area." Exhibit E, p. 2 (emphasis added). The expert goes on to support his opinions with reference to various CECRA standards. Exhibit E, pp. 13-14.

To prevent BNSF from converting Plaintiffs' lawsuit into a *de facto* DEQ enforcement action, Plaintiffs moved the trial court to exclude evidence of the inapplicable regulations on which BNSF relies. Recognizing, as this Court held in *Sunburst,* that BNSF's alleged regulatory compliance may be relevant to their punitive damage claims, Plaintiffs further moved the court for a bifurcated trial.

In its March 2 Order, the trial court denied Plaintiffs' motions, holding:

> Plaintiffs cited *Sunburst* . . . for the proposition that evidence of Burlington Northern's interaction with DEQ is irrelevant to the causes of action in the complaint, except for the punitive damages claim. *Sunburst* involved strict liability and after the fact negotiations with DEQ. The present case does not allege strict liability, and Burlington Northern was involved with DEQ as early as 2000 in attempts to resolve the contamination problems.
>
> * * * * *
>
> With respect to the present case, interaction between Burlington Northern and DEQ is so intertwined with the causes of action that to exclude such evidence would deny Burlington Northern the ability to defend itself against those claims.

Exhibit A, p. 2. Contrary to the trial court's conclusion, *Sunburst* does not limit its holding to strict liability claims. BNSF attempts to distinguish this case from *Sunburst* because the Plaintiffs in this case assert negligence and nuisance claims.

In *Sunburst,* however, the plaintiffs likewise asserted negligence and nuisance claims throughout the trial in which DEQ regulatory activity was properly excluded from evidence for compensatory damage purposes. See Pretrial Order from *Sunburst* attached as Exhibit F.

BNSF argues compliance with or violation of a statute is relevant to the determination of whether a defendant's conduct was negligent. While that is generally true, it assumes the existence of a statute which actually applies to the conduct at issue. Plaintiffs' claims are based on BNSF's wrongful conduct causing pollution to invade the Plaintiffs' properties, and not any conduct governed by CECRA. Furthermore, CECRA does not apply to the contamination at issue in any respect, as DEQ has not even initiated CECRA enforcement activity in Helena. David Clark depo, pp. 24-28, attached as Exhibit G.

The trial court's "after the fact negotiations" distinction likewise makes little sense. The language to which the court refers appears in the *Sunburst* decision at ¶ 78, elaborating on the court's previous conclusion that "[t]he evidence that Texaco sought to introduce of DEQ's role has no bearing, however, on Texaco's conduct before federal and state regulators became involved at the Sunburst site." *Sunburst,* ¶ 75. In *Sunburst,* Texaco created the gasoline plume during the refinery's operation from 1924 to 1961. *Sunburst,* ¶ 10. Texaco later communicated with DEQ about the

contamination from the 1980s to the early 2000s. *Sunburst,* ¶¶ 11-18. The *Sunburst* plaintiffs filed suit in 2001. *Sunburst,* ¶ 19. A similar chronology exists in this case.

BNSF created the plume of contamination on Plaintiffs' property during its operation of the railyard prior to 1987. BNSF's interactions with DEQ regarding the contamination have taken place since that time and continued until recent years. Plaintiffs filed the present action in 2008. As in *Sunburst,* BNSF's communications with DEQ after ceasing operations at the railyard have no bearing on its prior conduct causing the contamination at issue. The interactions likewise have no bearing on the proper common law remedy to address the harm.

Like the plaintiffs in *Sunburst,* the Plaintiffs in this case assert punitive damage claims against the polluter responsible for harming their property. While finding evidence of Texaco's interaction with DEQ irrelevant to the plaintiffs' compensatory damage claims in *Sunburst,* this Court held the evidence should have been admitted for purposes of punitive damages. *Sunburst,* ¶ 85. The Court recognized its decision would create difficulty for trial courts dealing with such evidence in the future. *Sunburst,* ¶ 86.

Concurring in a similar ruling in *Malcolm,* Chief Justice McGrath recently suggested the only possible approach which will prevent a jury from hearing

irrelevant and prejudicial evidence for purposes of compensatory damages, while allowing the same jury to hear the same evidence for purposes of punitive damages:

> Montana law provides for a bifurcated process for jurors to assess the amount of punitive damages. Section 27-1-221(7), MCA. In the future, trial courts should consider bifurcating liability issues from punitive damages issues. In situations involving similar conflicting evidence, it may be appropriate for the jury to address all of the issues regarding punitive damages following the trial on liability.

Malcolm, ¶ 107 (McGrath specially concurring).

Pursuant to Rule 42(b), M.R.Civ.P., courts can order separate trials of any issue or issues in a cause "in furtherance of convenience or to avoid prejudice." Where evidence is relevant and admissible for one purpose, yet irrelevant and prejudicial for another, the court may order the issues separately tried. *Eklund v. Trost,* 2006 MT 333, ¶ 49, 335 Mont. 112, 151 P.3d 870. To avoid delay and duplication of effort which result from bifurcation, Montana law also allows courts to bifurcate issues for trial before the same jury *seriatim. Malta,* 283 Mont. at 52, 938 P.2d at 1338-39. Given the complexity of the issues in this case and the competing evidentiary rulings required under Montana law, the parties cannot be afforded a fair trial without such a bifurcated proceeding.

The trial court's ruling, not only refusing to bifurcate the trial but also admitting evidence of inapplicable regulatory matters for all purposes is directly

contrary to settled Montana law. Supervisory control is necessary to prevent the injustice of multiple trials consuming enormous resources and time.

II. Did the District Court Err in Entering Summary Judgment Against Plaintiffs on the Applicable Statutes of Limitation?

Plaintiffs' causes of action derive from the continuing trespass and nuisance caused by BNSF's contamination. "Whether or not the two-year statute of limitations can be tolled in a nuisance case depends upon whether it is a permanent, temporary, or continuous nuisance." *Graveley Ranch v. Scherping*, 240 Mont. 20, 23, 782 P.2d 371, 373 (1989). "[I]f the nuisance is of a temporary, continuing nature, the statute of limitations is tolled until the source of the injury is abated. . . ." *Knight v. City of Missoula*, 252 Mont. 232, 244, 827 P.2d 1270, 1277 (1992). A nuisance is continuing when the offending party could have abated it by taking curative action–a terminable nuisance cannot be deemed permanent. *Walton v. City of Bozeman*, 179 Mont. 351, 357, 588 P.2d 518, 521 (1978). Likewise, with respect to trespass, an actor's failure to remove something tortiously placed on another's land is considered a "continuing trespass" for the entire time the object remains on the land. Restatement (Second) of Torts § 161, cmt. b (1965).

In *Graveley*, the defendants' residence burned to the ground in September 1984, leaving lead batteries exposed to the Graveley Ranch's neighboring pastures.

Between 1985 and the end of 1986, several of the Graveley Ranch's cows died from lead poisoning. On November 4, 1985, the Graveley Ranch received notification that the state pinpointed the defendants' exposed foundation as the source of the lead poisoning. The Graveley Ranch admitted knowledge of this fact as early as September 25, 1985. On October 29, 1987, the Graveley Ranch filed suit. The District Court concluded the two year statute of limitations had expired and granted the defendants' motion for summary judgment.

On appeal, this Court reversed, concluding:

> Here, although the plaintiff's injury is traceable to a single nonrecurring event, the continuing presence of the exposed batteries created an ongoing hazard . . .
>
> * * * * *
>
> Here, the contaminants from the ruptured batteries could and should have been cleaned up by the defendants. An immediate cleaning of the site could have prevented the death and illness of the plaintiff's cattle. The nuisance in this case is temporary, because cleaning the site would have readily abated the hazard.

Graveley, 240 Mont. at 24-26, 782 P.2d at 374-75.

This Court reached a similar conclusion in *Nelson v. C & C Plywood Corp.*, 154 Mont. 414, 465 P.2d 314 (1970). There, the plaintiffs purchased a small farm near Kalispell in 1948. In 1960, C & C Plywood purchased a sawmill adjacent to the Nelsons' farm and converted it into a plywood manufacturing plant. The plant

discharged bonding glue into a ditch. The Nelsons' domestic water turned brown and developed an offensive odor. The Nelsons filed suit against the plant in 1965. This Court held that the pollution of the groundwater constituted a continuing, temporary nuisance. *Nelson*, 154 Mont. at 434, 465 P.2d at 325. Although the dumping began in 1960, and the Nelsons did not file their complaint until 1965, the court concluded that the continuing nuisance tolled the statute of limitations.

Other jurisdictions echo the sentiment expressed in *Graveley* and *Nelson*. In *Hoery v. United States*, 64 P.3d 214, 220 (Colo. 2003), the Colorado Supreme Court addressed a statute of limitations defense in an environmental contamination case. The defendant in *Hoery*, the United States government, operated Lowry Air Force Base in Denver, Colorado, from the 1940s to 1994. During that time, the U.S. disposed of TCE and other toxic chemicals at Lowry. This disposal resulted in subsurface plumes extending north of Lowry, contaminating the neighborhood of Montclair. Although the U.S. discontinued all operations at Lowry in 1994, the plume continued to migrate beneath Montclair.

In 1993, the Hoerys bought a residence in Montclair, seven blocks from Lowry. In 1997, testing of a well on the Hoery property revealed the presence of TCE. In 1998, the Hoerys filed suit against the U.S. alleging continuing trespass and nuisance. The United States District Court held the allegations constituted permanent tort

claims, the facts of which the Hoerys knew or should have known in 1995. The court dismissed the claims as time-barred. The Tenth Circuit found the existing Colorado case law inconclusive on the issue and certified the case to the Colorado Supreme Court.

The Colorado Supreme Court summarized the state's continuing versus permanent trespass/nuisance case law–treatment virtually identical to Montana's. Next, it considered "whether the continuing migration and ongoing presence of toxic pollution on a plaintiff's property constitutes a continuing trespass and/or nuisance, even though the condition causing that pollution has ceased." *Hoery*, 64 P.3d at 220. The record indicated "the contamination is not permanent–that is, it is remediable." *Hoery*, 64 P.3d at 222. The court found that Colorado's public policy "favors the discontinuance of both the continuing migration and the ongoing presence of toxic chemicals into Hoery's property and irrigation well." *Hoery*, 64 P.3d at 223. It also found permitting causes of action for each day the invasion continued would encourage the tortfeasor "to stop the property invasion and remove the cause of damage." *Hoery*, 64 P.3d at 223. Thus, the court held the Hoery's claims were not barred by the statute of limitations:

> [t]he daily migration and presence of those chemicals on Hoery's property constitute the continuing torts of trespass and nuisance in this case. While these continuing property invasions remain, it is immaterial

> whether the United States continues to release toxic pollutants from Lowry.

Hoery, 64 P.3d at 222.

The trial court's decision in this case is based on an erroneous interpretation of this Court's decisions. The trial court concluded, "[t]he one factor common to all of the cases involving continuing nuisance is that the cause of the nuisance was abatable, not the resulting harm." Exhibit B, p. 8. The court determined the cause of Plaintiffs' damages to be the diesel fuel spills on the railyard. Since the leaks discontinued when BNSF ceased operations in 1987, the court found the cause has already been abated. This, according to the court, deems the nuisance permanent in nature, rendering the continuing tort doctrine inapplicable.

In *Graveley*, this Court noted the "single nonrecurring event" to be the burning of the structure, thereby exposing the ongoing hazard (the batteries). *Gravely* did not reject the continuing tort concept because the home ceased burning years prior to the harm inflicted by the exposed batteries. Rather, the continuing tort doctrine applied because the "continuing presence of the exposed batteries created an ongoing hazard potentially injurious to health and interfering with the plaintiff's use of the land for grazing." The nuisance in *Gravely*, therefore, was the ongoing presence of the injury causing mechanism–the batteries. In *Nelson*, the ongoing existence of pollution in

the groundwater was the nuisance, not the original act of dumping manufacturing waste. *Nelson*, 154 Mont. at 434, 465 P.2d at 325.

In *Sunburst*, Texaco spilled large quantities of gasoline into the soil and groundwater on and around the refinery site from 1924 to 1961. Gasoline spills attributable to Texaco ceased in 1961 upon the refinery's closing. Approximately 40 years after Texaco ceased operations at the refinery, residents of Sunburst filed suit. *Sunburst*, ¶¶ 10, 19. Based on the trial court's analysis in this case, the *Sunburst* plaintiffs claims would have been barred by the statute of limitations. However, the trial court in *Sunburst* rejected the narrow interpretation employed by the First Judicial District Court and found the nuisance and trespass to be continuing in nature. See Exhibit H.

Here, the injurious mechanism giving rise to Plaintiffs' claims is the presence and ongoing migration of the toxic contamination on their properties. Therefore, the pollution itself is the ongoing nuisance and trespass. Whether the conduct giving rise to the toxic plume has ceased is of no consequence to the continuing tort determination. Plaintiffs would have suffered no damage if the leaks occurred and were contained within the railyard. The nuisance and trespass at issue here can only be abated by cleaning up the contamination.

The foregoing implicates purely legal conclusions, ripe for supervisory control consideration. No dispute exists in this case as to the presence of contamination on Plaintiffs' properties. Exhibit G, pp. 60-61; John Norris depo, pp. 58, 86-91, 147-48, attached as Exhibit I. BNSF and its experts likewise admit the pollution on Plaintiffs' properties is a temporary problem which can be removed. Exhibit I, pp. 152-53; Exhibit E, p. 2. While the parties disagree as to the cost and proper manner of cleanup, all of the experts agree the contamination can be cleaned up. Exhibit E, pp. 32-39; Plaintiffs' Expert Witness Disclosure attached as Exhibit J, pp. 10-11.

BNSF takes the position a nuisance is abatable and continuing only if it can be quickly and easily removed. However, in *Sunburst,* in affirming the jury's restoration damage award, this Court found the soil and groundwater contamination at issue temporary. *Sunburst*, ¶¶ 31, 49. The contamination at issue was very similar to the contamination at issue here, and was removable using the same active cleanup methods advocated by the Plaintiffs in this case. Because the contamination was removable, the Court found it temporary, regardless of the fact that removal would require significant effort and cost. *Sunburst,* ¶ 49.

Under Montana law, a party can seek restoration damages to address a temporary, abatable nuisance and/or trespass. *Sunburst*, ¶ 31. Under the trial court's rationale, an aggrieved property owner could never seek restoration of his/her

property contaminated by tortious conduct which has since ceased–conduct which was not actionable at the time because it did not immediately impact another's property. See *Nelson*, 154 Mont. at 434, 465 P.2d at 324 ("[W]hen the injury is not complete so that the damages can be measured at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the reasons or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom.").

The trial court erred as a matter of law in focusing exclusively on the original conduct giving rise to the nuisance and trespass. The court should have examined the nuisance and trespass itself–the toxic contamination–for purposes of the temporary, abatable analysis. Because the contamination on Plaintiffs' properties is temporary and removable, BNSF continues to propagate a nuisance and trespass on Plaintiffs' properties, and the statute of limitations cannot run.

Furthermore, regardless of the continuing nature of BNSF's torts, the statute of limitations cannot bar Plaintiffs' claims because Plaintiffs did not learn of the nature and extent of contamination on their property until their environmental consultants recently completed testing. In Montana, the statute of limitations does not begin to run on a claim for damages which are self-concealing until the plaintiff discovers or

should have discovered the facts constituting the claim. Section 27-2-102(3)(a), MCA.

With respect to surface lead, BNSF did inform some Plaintiffs of concentrations detected on their properties. BNSF subsequently performed some lead removal work in the neighborhood. Exhibit I, pp. 131, 185-86. None of Plaintiffs' claims are based on lead which BNSF already removed from their properties. Rather, the claims are based on lead which has re-contaminated the properties from the railyard, and a massive plume of diesel fuel about which BNSF never informed any of the Plaintiffs. Exhibit J, pp. 5-7, Figures 2-3.

With respect to the petroleum hydrocarbons in the soil and groundwater, BNSF failed to accurately investigate the extent of contamination it caused and provided no information whatsoever to Plaintiffs regarding the harm to their properties. Exhibit I, pp. 131-33. While providing no information to Plaintiffs, BNSF submitted multiple plume maps to DEQ purporting to delineate the extent of diesel contamination in Plaintiffs' neighborhood dating back nearly 20 years. BNSF's maps indicated in 1988 a relatively short and narrow plume of diesel had migrated about one half of a block north of the railyard. Exhibit I, Exhibit 90, p. 3. In reality, a massive plume of diesel fuel originating from the railyard has spread across several blocks and onto Plaintiffs' properties. Exhibit J, Figure 2.

BNSF argued to the trial court that Plaintiffs had sufficient knowledge of the diesel contamination based on various newspaper articles addressing contamination at the railyard. First, BNSF did not properly authenticate any of the articles it relied on in support of its motion. Second, the mere existence of publicity does not establish that a plaintiff should have known the contents thereof. *Migliori v. Boeing North American, Inc.*, 97 F.Supp.2d 1001, 1011 (C.D.Cal. 2000). Even imputing knowledge of the newspaper reports to Plaintiffs would not provide Plaintiffs with knowledge regarding the damage to their properties. Several of the articles dealt with lead testing on and around the railyard, where railroad representatives opine that the lead contamination is confined to the railyard. See the articles attached as Exhibit K. The article cited by BNSF addressing diesel spills advises readers that "[d]iesel remains in the ground near the BN depot, in the Helena storm drain system and on drain retention ponds near K-Mart." Exhibit K. Even if BNSF established that all of the Plaintiffs read or should have read these five newspaper articles, none of the articles fairly advised Plaintiffs that BNSF's operations polluted their properties.

Although some of the Plaintiffs had a vague and general understanding that BNSF polluted its railyard some time ago, they had no awareness of or ability to ascertain the extent to which BNSF harmed their properties. In Montana, the statute of limitations cannot run on a claim for damages of which the plaintiff is not aware,

unless the plaintiff has some reasonable means of discovering them. Section 27-2-102(3)(a), MCA; *Strom v. Logan*, 2001 MT 30, ¶¶ 15-18, 304 Mont. 176, 18 P.3d 1024. See also *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 980, 986-87 (D.V.I. 1995); *Taygeta Corp. v. Varian Assocs., Inc.*, 763 N.E.2d 1053, 1062 (Mass. 2002). The trial court's premature summary ruling on disputed issues of fact constitutes a mistake of law, resulting in a gross injustice to Plaintiffs.

CONCLUSION

The trial court's rulings are contrary to Montana law, and the normal appeal process is inadequate to address the trial court's mistakes. Absent supervisory control, Plaintiffs will suffer a gross injustice at the hands of the trial court's erroneous legal conclusions.

DATED this 16th day of April, 2010.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and legible copy of the foregoing **Petition for Writ of Supervisory Control** was served on the 16th day of April, 2010, postage prepaid thereon by first class mail, upon the following:

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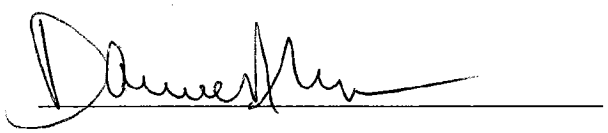

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(4)(d) and 14 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by WordPerfect X3, is not more than 5,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 16th day of April, 2010.

LEWIS, SLOVAK, KOVACICH & MARR, P.C.

By: _____

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